United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7626

To be argued by
Arthur N. Seiff

United States Court of Appeals

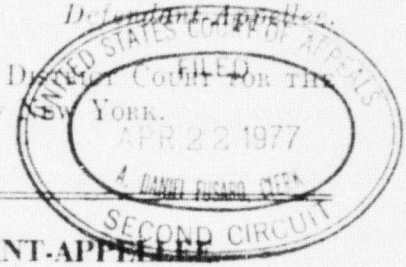
For the Second Circuit.

B P/S

ANNA R. JOHNSON and ROBERT K. JOHNSON,
Plaintiffs-Appellants,

against

PHILLIP KNAPP,
Defendant-Appellee.



APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLEE

ANTHONY L. SCHIAVETTI
Attorney for Defendant-Appellee
Office & P. O. Address,
c/o ARTHUR N. SEIFF
51 Chambers Street
New York, N. Y. 10007
(212) 732-7590

ARTHUR N. SEIFF,
of counsel.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Preliminary statement.

Plaintiffs appeal from an order of the United States District Court, Southern District of New York (Hon. William C. Conner), which denied a motion by plaintiffs to set aside a jury verdict for defendant (A30, A23-A29, A3).*

Facts.

Plaintiffs' motion was based on a letter that one of the jurors wrote to defendant's trial counsel about a month after the trial (A4, A6-A8, A15). Plaintiffs claim that it appears from that letter (1) that there was an "apparent romantic infatuation" on the part of that juror with defendant's trial counsel (A7) and (2) that the juror "could not hear all the evidence" (A7).

*Plaintiffs had also appealed from the judgment for defendant entered on that verdict; this Court unanimously affirmed that judgment (2d Circ. docket no. 76-7249).

The letter plaintiffs rely on is set forth in full in the Appendix (A15, cf. A14) and is also quoted in full in Judge Conner's opinion (A24-A25). It therefore is unnecessary to protract this brief by quoting it herein.

There never was any communication, oral or otherwise, between any of the jurors, including that juror, and defendant's trial counsel, other than his receipt of that letter, to which he never replied in any manner whatever (A21).

The *voir dire* of the juror who plaintiffs' attorney argues could not hear, by the trial judge who was seated further from the jurors than were the witnesses and the attorneys for the parties, conclusively refutes the argument of plaintiffs' attorney that the juror could not hear the evidence (A20-A21).

The opinion of the District Court (Conner, J.) denying the motion is set forth at pages A23-A29 of the Appendix.

POINT I.

The facts do not sustain the argument of plaintiffs' attorney that the verdict should be set aside on the ground of misconduct by one of the jurors.

Plaintiffs' attorney bases her motion on two arguments, (1) that there was an "apparent romantic infatuation" on the part of one of the jurors with defendant's trial counsel and (2) that that juror "could not hear all the evidence" (A7).

As to the argument of plaintiffs' attorney about an "apparent romantic infatuation."

That argument is based on a letter of praise that the juror wrote defendant's trial counsel several weeks after the trial (A15; cf. A14). The argument of plaintiffs' attorney is baseless. It misinterprets the juror's letter and the clipping enclosed therewith. That letter and clipping do not justify plaintiffs' attorney's conjecture and speculation with reference thereto. The trial judge was fully justified in rejecting plaintiffs' attorney's argument (A23-A29).

This motion involves no more than the disappointment of plaintiffs' attorney in the result of the trial. That disappointment is no ground for setting the verdict aside.

As to the claim that that juror could not hear the evidence.

That also is based on a misrepresentation of the letter. It is additionally conclusively refuted by the *voir dire* of that juror by the trial judge which shows that there was no impairment of hearing (A20-A21).

Misleading statements regarding the facts, in plaintiffs-appellants' brief.

Aside from the fact that plaintiffs-appellants' brief is replete with conclusory statements not sustained by the record, it also contains misleading statements. For example, plaintiffs' attorney implies that defendant's attorney tried to conceal the juror's letter from her (ptffs.' brief, p. 6). The record shows that it was defendant's counsel who brought that letter (which was written a month after the verdict) to the attention of plaintiffs' counsel (A6, A19; cf. ptffs.' brief, p. 4).

Nor is there a single word in the letter to justify plaintiffs' attorney's statement that "the juror stated . . . she was in substance wondering if during the trial, especially in his [defendant's attorney's] summation, whether he was 'titillated' by her during the trial" (ptff.'s brief, p. 6; cf. A14).

Then again, when plaintiffs' attorney (1) states that "It was gross misbehavior for the juror to write this letter to the defense counsel concerning the cause which she was trying" and (2) argues that there was "private contact by mail and communication directly by a juror with counsel for the defense", on the basis of which plaintiffs' attorney further argues that (3) this "was prejudicial to the plaintiffs" (ptff.'s brief, pp. 7, 10), plaintiffs' attorney ignores the fact that that letter was not written until a month after the verdict was rendered and that there was no oher communication of any kind at any time (A6, A15, A21).

Nor does the letter justify the statements by plaintiffs' attorney that the juror was "sexually aroused" and "under an emotional influence amounting to being drunk with admiration for the defense counsel" (ptffs.'s brief, p. 13). When fairly read in context, it is perfectly clear that what the juror was saying is that she found her first experience as a juror to have been stimulating and interesting, the more so because of counsel's manner of presentation (A14).

POINT II.

Plaintiffs' motion is based on an impermissible ground. The Court below properly denied it.

As noted earlier in this brief, plaintiffs' motion is based entirely on a letter that a juror wrote about a month after the trial.

The motion to set aside the verdict on the basis of that letter is impermissible. The applicable rule was stated in *Bateman* v. *Donovan,* 131 F. 2d 759, at page 764 (9th Circ., 1943):

> "The general rule is that affidavits of jurors will not be received for purposes of impeaching their verdict. [cits.]"

That is the rule in this Circuit (*Skidmore* v. *Baltimore & O. R. Co.,* 167 F. 2d 54, at pages 60-61 [2d Circ., 1948]).

See also: *Thedorf* v. *Lipsey,* 237 F. 2d 190, 194 (7th Circ., 1956).

This is all the more so as regards a letter (not an affidavit) by a juror, such as plaintiffs complain of in the case at bar.

The public policy reason for denying such a motion was stated clearly and convincingly in *McDonald* v. *Pless,* 238 U. S. 264, at pages 267-268:

> "Let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."

The same rule, based on the same public policy that was enunciated by the Supreme Court, by this Court and by the other Circuits, that a juror is precluded from stating or attesting or testifying to his or her misconduct (assuming *pro arguendo* that there was misconduct, which there was not in the case at bar), also is the rule in the New York State Courts.

People v. *DeLucia,* 20 N.Y. 2d 275, at page 277, expressly recognizes that "New York case law holds that statements by jurors impeaching their own verdicts are inadmissible".*

In *Payne* v. *Burke,* 236 App. Div. 527, at page 529, the Court held, consistently with the holding in the Federal cases:

> "The rule is well settled that affidavits of jurors are not competent to impeach their verdict which has been solemnly made, and publicly returned into court. [cits.]
>
> "The reason for this rule is founded on sound public policy. If jurors, after they have been discharged and have mingled with the public, were permitted to discredit the verdict which they had solemnly rendered in open court, no verdict would be safe, and judgments would rest on a very uncertain foundation. The consequences of such practice would be most mischievous; it would open the door for tampering with jurors, and would make it

**DeLucia* held that because of the Sixth Amendment to the United States Constitution and the holding in *Parker* v. *Gladden,* 385 U.S. 363, which involved a criminal prosecution and was based on the Sixth Amendment, this rule is inapplicable in criminal prosecutions. *DeLucia* is authority for defendant in the case at bar because the Sixth Amendment does not apply to our case (the Sixth Amendment is expressly limited to "criminal prosecutions"), and so the general rule, enunciated in *McDonald, supra* (238 U.S., at pp. 267-268), applies in our case.

> knows full well how easy it would be to find some easy for a corrupt or dissatisfied juror to destroy the very verdict to which he had deliberately given his assent under the sanction of an oath. Jurors would constantly be importuned by dissatisfied litigants, and pressed for affidavits upon which their verdict might be assailed. Every trial lawyer complacent juror who would yield to such appeal. If such practice were countenanced, few, if any, verdicts would survive, and there would be no end to litigation [cits.].
>
> "'It is said to be better that an individual should suffer, than that such a rule, which must be productive of infinite mischief, should be introduced.' (*Tyler* v. *Stevens*, 4 N.H. 116, 117.)"

To the same effect are *Dalrymple* v. *Williams*, 63 N.Y. 361; *Davis* v. *Lorenzo's, Inc.*, 258 App. Div. 933; *Sindle* v. *761 Ninth Ave., Corp.*, 127 N.Y. Supp. 258, 259 (not otherwise reported), affd. unan. 283 App. Div. 939).

If the rule were otherwise, a verdict could become the beginning, not the termination, of a case. It is the very basis of our jury system that jurors should not explain or account for their verdict.

There is no reason for changing the general rule in our case. As is indicated in the dissenting opinion of Judge Van Voorhis in *DeLucia* (20 N.Y. 2d, at pp. 285-286), this general rule has "spread to every jurisdiction in the United States with the exception of Iowa".

This is particularly true in the case at bar where it is obvious that the motion by plaintiffs' attorney is based solely on her disappointment in the result of the trial.

This Court, in *Jorgensen* v. *York Ice Machinery Corp.*, 160 F. 2d 432, 435 (2d Circ., 1947), stated, in pertinent part:

> "On the other hand, it would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test; and although absolute justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive; they would become Penelopes, forever engaged in unravelling the webs they wove."

There is nothing in any of the cases cited by plaintiffs that in any way diminishes the foregoing principles. For example, *Remmer* v. *United States*, 347 U. S. 227, and the other cases cited by plaintiffs' attorney at pages 9 and 10 of her brief, and *Mattox v. United States*, 146 U. S. 140 and *People* v. *Leonti*, 262 N.Y. 256, cited by plaintiffs' attorney at pages 10 and 11 of her brief, were all criminal cases and so, as shown at page 6, *supra*, are not applicable to the case at bar, a civil action.

Nor are the other cases cited by plaintiffs' attorney applicable to the facts in the case at bar, in which the trial court properly denied plaintiffs' motion.

IN CONCLUSION,

it is respectfully submitted that the order appealed from should be affirmed.

Respectfully submitted,

ANTHONY L. SCHIAVETTI,
Attorney for Defendant-Appellee,
Office & P. O. Address,
c/o ARTHUR N. SEIFF,
51 Chambers Street,
New York, New York 10007.
Tel. (212) 732-7590

ARTHUR N. SEIFF,
of counsel.

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